

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

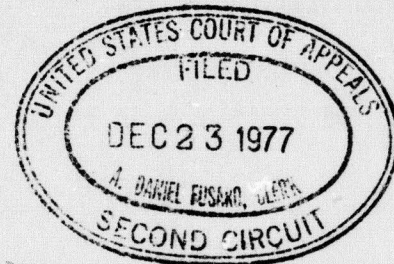
77-1417

To be argued by
JONATHAN J. SILBERMANN

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
ARNOLD B. MOSKOWITZ,
Defendant-Appellant.

B P / S
Docket No. 77-1417



BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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FOR THE EASTERN DISTRICT OF NEW YORK

QUESTIONS PRESENTED

1. Whether the failure of the trial judge to suppress Pyle's in-court identification testimony requires reversal.
2. Whether the admission of the police sketch of the robber was error requiring reversal.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgment of the United States District Court for the Eastern District of New York (The Honorable Ellsworth A. VanGraafeiland*) rendered on September 16, 1977, after a jury trial, convicting appellant Arnold B. Moskowitz of bank robbery by force, violence, and intimidation (Count I) (18 U.S.C. §2113(a)) and bank robbery by the use of a dangerous weapon (Count II) (18 U.S.C. §2113(d)). Appellant was sentenced to an interim study pursuant to 18 U.S.C. §5010 (e), and execution of that sentence was stayed pending appeal.

This Court assigned The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

A. The Indictment**

On January 28, 1977, an indictment was filed, charging appellant with stealing \$279,000 from the Coney Island Avenue branch of the Chemical Bank. Count I of the indictment alleged

*United States Circuit Judge for the Second Circuit, sitting in the Eastern District by designation.

**The indictment is reproduced as B to the separate appendix to appellant's brief.

that appellant committed the robbery on June 3, 1976, by force, violence, and intimidation (18 U.S.C. §2113(a)), while Count II charged that during the course of that crime, appellant had placed lives in danger by the use of a dangerous weapon (18 U.S.C. §2113(d)).

B. The Pre-Trial Proceedings

Prior to trial, appellant moved to exclude from evidence a police artist "composite" sketch prepared one day after the robbery, as well as to suppress the identification testimony of the various witnesses to the crime. A hearing was held on the question.

Michael Gleason, then the manager of the Coney Island Avenue branch of the Chemical Bank, testified that on June 3, 1976, he drove into the parking lot of the bank at approximately 8:50 a.m. (67*). As he left his car, he heard someone call "Michael." Gleason then looked in the direction of the person who was seated in a parked car nearby. Thereafter, that person asked twice if Gleason recognized him, and Gleason answered "no" both times. As the bank manager walked toward the person's car, he again said that he did not recognize the caller. When Gleason was near the car, the person who had been talking to Gleason pointed a gun at him, telling Gleason to walk around the car

*Numerals in parentheses refer to pages of the trial transcript. Numerals preceded by "G.X." refer to numbers of Government exhibits in evidence; numerals preceded by "D.X." refer to numbers of defense exhibits in evidence.

and to get in on the passenger side, which Gleason did (69, 115, 117, 119-120). The person in the car then told Gleason, "We are going to rob your bank.... I want you to be calm and no one will be hurt [Y]ou can see we are professionals and I am very calm also" (69, 121-124). After revealing a hand grenade and threatening to bomb Gleason's home, the robber showed Gleason a walkie-talkie and stated that the precinct's activity would be monitored (69, 123, 126-127, 129). As a result of further conversation relating to the robber's demand to open the bank vault, the manager "became very upset" (70, 130-131).

After about three minutes with the robber (132-134), Gleason left the car and went into the bank, followed by the robber (71, 134).^{*} Inside the bank, Gleason called to Joyce Pyle and Frances Criscione, two employees, in order to open the vault. Gleason told Pyle and Criscione that the man with him was going to rob the bank, whereupon they all went into the bank vault and tried to open it. After a second attempt, Gleason set his "side" of the vault's combination.^{**} Gleason testified that Ms. Criscione had difficulty with the combination, since she was not wearing her reading glasses. After the robber told Criscione that she had 35 seconds to open the vault, she set the combination. As a result of the robber's demand,

^{*}As Gleason and the robber went into the bank, another person walked around the corner and stood at the bank door (137).

^{**}It was subsequently explained that two people, each with a different combination, were required to open the vault (146, 438).

Gleason removed two bags filled with money, putting them on the floor. The robber, whom Gleason identified at the hearing as appellant, picked up the bags and left the bank (72-73, 139-141, 143-150, 296).

When the police arrived at the bank after the robbery, Gleason described the robber as a 5'8"-tall, 160-pound white male with dirty blond hair and a mustache (166-167, 171).^{*} Gleason testified that on June 4, 1976, Joyce Pyle gave her description to a police artist, who made a sketch or composite drawing based on it. After Gleason reviewed the composite and made suggestions, the artist modified the drawing into its final form (174, 176-177). Gleason stated that he saw the completed drawing or a copy of it on June 4 and on another unspecified, subsequent date (180, 205).^{**}

Gleason testified that on June 9 and June 23, 1976, he was shown six and eight photographs, respectively, and chose appellant's picture as looking like the robber (80-82, 194, 196, 483, 573, 581). On June 23, after viewing the photographic spread and at his request, Gleason was shown four additional photographs of appellant (83-84, 197, 199, 203). Not surprisingly, Gleason indicated that those photographs "helped [him] in identifying the individual" (96). Gleason also stated that as a result of a line-up held on August 12, 1976, he selected appellant as the robber (85-86). Further, Gleason testified

^{*}At the hearing, Gleason testified that the robber's complexion was fair (169).

^{**}A picture of appellant and a photograph of the composite are annexed as Exhibits A and B, respectively, to Agent DiBona's affidavit in support of his request for an arrest warrant. Record on Appeal, Document No. 1.

that in December 1976, in the office of the Assistant United States Attorney, he was shown two more photographic spreads. One consisted of a series of mug shots; the other, of individual pictures of the prior line-up. Gleason selected appellant's photograph from each display (88-91, 217, 224). Subsequent to these events, Gleason saw a photograph of appellant in the New York Post (91-92, 225).

Joyce Pyle, an employee of the bank, testified that she first noticed the robber, whom she identified at the hearing as appellant (232), when he entered the bank with Gleason (229), and confirmed the bank manager's testimony about the robbery (230-231, 240-246). Pyle stated that she participated in making the police drawing of the robber and saw the completed sketch the day after the robbery, identifying it as an accurate representation of the person involved (232). She also testified that she selected appellant's photograph from the June 9 photographic spread as the one she felt was the culprit (256-257), but was unable to make an identification after the June 23 procedure (234, 258). At the line-up, Pyle identified an FBI agent as the robber (235). Further, Pyle testified that after the line-up and prior to trial, either the Assistant United States Attorney or FBI Agent DiBona informed her that she had selected the wrong man at the line-up procedure (235, 261-262, 268).*

*This testimony was confirmed by FBI Agent DiBono (361).

Attorney that she was sorry and that she "couldn't understand how come [she] couldn't pick out the right fellow at that time or whatever" (263). Prior to a second meeting with the Assistant United States Attorney, Pyle learned, from either the Assistant or one of the FBI agents (266), that both Gleason and Criscione had picked out "the right person" (265). At that meeting, Pyle was shown individual photographs of the participants in the line-up; this time she selected appellant's photograph (236, 266).*

Frances Criscione, another bank employee, testified that she first noticed the robber entering the bank with Gleason, but that she had turned away and continued with her banking chores (292, 294, 313). After being called, she followed Gleason into the vault area of the bank, where she was told that the bank was being robbed (292-293, 314-317). After Gleason finished setting his side of the combination, Criscione, who is far-sighted, was unable to see the numbers on the dial, but "back[ed] up a bit" and was then able to open the vault (296-297, 318-323). Criscione identified appellant as the robber (298).

Further, Criscione testified that she saw the police drawing on June 4, 1976 (298, 331-333), which she said was an accurate likeness of the robber (301). Criscione indicated that on June 9 and June 23, as a result of the photographic identification

*Ms. Pyle stated that the robber's complexion was "ruddy" (239, 254), and described him to the police as being 5'10" tall, weighing 160 pounds, and having blond hair and blue eyes (248).

procedures, she chose appellant's picture (302, 304, 337) and selected appellant at the line-up (365). On June 9, Criscione identified appellant's photograph "as most closely resembling the robber" (612). Like Gleason, Criscione saw the newspaper article containing appellant's picture (308).*

At the conclusion of the hearing, the trial court ruled that the police drawing was admissible as a statement of prior identification under Rule 801(D)(1)(C) of the Federal Rules of Evidence.**

As to the question of the identification testimony, Judge VanGraafeiland found that the June 9 photographic spread consisted only of two persons who were similar in appearance to appellant (392). Nevertheless, he permitted the witnesses to make an in-court identification and ruled that they could testify to the pre-trial procedures:

I am satisfied that there was nothing impermissibly suggestive or unfair about any of the photographic displays or the lineup and I find that there was sufficient evidence of independent recollection to support the in-court identification by all three parties and also sufficient evidence as to the pre-trial photographs and the lineup.

(397-398).

*At the hearing, Ms. Criscione stated that she had told the police that the robber was 5'9" tall, 30 years old, bow-legged, and that the cheek areas were dark (327-328, 346).

**The trial judge's decision on this question and his rulings as to the eyewitness testimony are reproduced as D to the separate appendix to appellant's brief. In ruling on the admissibility of the police composite, Judge VanGraafeiland also referred to United States v. Messina, 507 F.2d 73, 76 (2d Cir. 1974), and United States v. Deegan, 202 F.Supp. 968, 974 (S.D.N.Y. 1968).

C. The Government's Case

In accord with the judge's prior ruling, over defense objections (467, 474), the Government was permitted to enter in evidence the police sketch of the robber which had been prepared on June 4, 1976 (G.X.2, 477). Thus, the bank manager testified that he participated in the creation of the police drawing and described how it was modified and completed. Further, Gleason stated that the drawing was a fair and accurate representation of the bank robber (466-467, 469-474). Similarly, at trial, both Frances Criscione and Joyce Pyle, the bank employees, stated that after the robbery they identified the police sketch (G.X.2) as a "good likeness" of the robber (610-611, 692, 721).

At trial, the bank's employees repeated their prior testimony describing the robbery (Gleason, 432-444, 458-466, 533-534, 558-560; Criscione, 601-604; Pyle, 684-687) and the numerous pre-trial identification procedures (Gleason, 479-480, 492-492, 497-499, 566-585; Criscione, 612, 617, 620-622, 654; Pyle, 691-695, 706-716). Each identified appellant as the robber (445, 605, 688), telling the jurors that they now had "no doubt" (589) or "were certain" (504, 660) of the identity of the bank robber.* On cross-examination, Criscione revealed that she was

*It was stipulated that appellant was the only person depicted in each of the identification procedures (502). Moreover, Gleason testified that a brown leather jacket seized from appellant's home on the day of his arrest, although similar in color to the jacket worn by the robber, was in fact not the jacket in question (549-550).

wearing sunglasses during the robbery (649).

Moreover, records of National Airlines were admitted into evidence (596). These documents reflected that appellant made plane reservations on June 3, 1976, and actually flew to Florida on that day (597-598).*

In addition, records of the bank were admitted into evidence. These records indicated that appellant maintained a checking account there (624-625) and that from January 1976 to June 2 of that year, appellant transacted business approximately four times a month (636).

D. The Defense Case

Kenneth McGuinness, a former "officer assistant" at the Chemical Bank (735), testified that on June 3, 1976, he arrived at the Coney Island Avenue branch of Chemical Bank at approximately 8:50 a.m., when he saw a person sitting in a car in the parking lot, reading a newspaper (736-737). Approximately five minutes later, between 8:55 and 9:00 a.m., McGuinness saw Gleason come into the bank, call to Pyle and Criscione, and walk

*Former New York City police officer Amedeo Gallo testified that appellant was an auxilliary policeman, who would be trained to use walkie-talkies or scanners (664-665). Further, Gallo indicated that anybody could buy such devices in radio stores (670-672). Hal Bloomberg, the senior electrical engineer of the New York City police department, testified as part of the defense case. He indicated that a scanning device may be purchased at a store such as Radio Shack (829-832).

over to the vault area (740-743). McGuinness also noticed a man in that area at that time (743-744). McGuinness testified that he "had a fixed implant of the individual's face recorded in [his] memory, and it stuck there" (765). Further, he stated that the fourth person with Gleason, Criscione, and Pyle was not appellant (745). Moreover, some time prior to McGuinness' transfer to the Park Avenue branch of the bank in June 1976, Gleason showed him the June 9 photographic spread, specifically pointing out appellant's photograph (G.X.3-D) (747, 749-752, 782-785). McGuinness testified that the person in the photograph was not the robber (752).

McGuinness indicated that he had attended the August 12 line-up but had not recognized any of the participants as the bank robber (755). He did, however, identify appellant as a bank customer, explaining that he remembered approving the cashing of a check for appellant in the fall of 1975 and that appellant was there with his black German shepherd (755-756).*

As a result of cross-examination, on re-direct, McGuinness indicated that a month prior to trial, and before he had met defense counsel, he had told the Assistant United States Attorney that appellant was not the robber, that he remembered handling a banking transaction for appellant, and that appellant had had a German shepherd dog with him at the time (795-796, 800-

*On cross-examination, McGuinness confirmed that the police sketch was a very good likeness of the robber (776).

804).*

Elizabeth Doyle, the executive director of the New York State Political Action Committee, testified that from January 1971 through January 1977 she had been employed by United States Senator James Buckley (818) and that she first met appellant -- then a high school student -- in 1970, when he was a regular volunteer with the campaign (818). In May 1976, Doyle offered appellant a full-time job with the 1976 campaign, to start in mid-June, after appellant had completed the school year (818-819). Doyle testified that on several occasions during the discussions relating to the position appellant would fill, appellant stated that since he knew the campaign would be "vigorous," he wanted to travel to Florida for a short vacation prior to commencing the job (826). Except for his arrest, appellant worked for the Buckley campaign until its conclusion (821-822).

Howard Brooks, the proprietor of a gas station two blocks from the bank (835), testified that appellant worked for him "on and off for about eight years" (836). On May 20, 1976, Brooks informed appellant that his services were no longer needed, since "another kid ... would be able to start" (839).**

*Police Officer Basso testified that the records of the precinct in which the bank was located reflected that from May 31 to June 4, 1976, there were no missing walkie-talkies and that from 1972 to 1976 there were only two reports of missing walkie-talkies -- one in 1972, the other in 1974 (811, 813-815).

**Appellant confirmed this testimony (1029).

Appellant stated that he wanted to work two more weeks and, as a result of discussion "just short of an argument," Brooks permitted appellant approximately one week's additional employment (839-840). Brooks also testified that in the late morning of the day of the bank robbery, he saw appellant at the gas station (839). Moreover, Brooks explained that through the years appellant would get change for the station at the bank -- 50, 75, 100 times -- and remembered that appellant got change after the date of the robbery (841-842). Brooks also stated that for approximately one month prior to appellant's leaving his job at the gas station, he mentioned that, prior to working for Senator Buckley, he would take a vacation in Florida (849).

On cross-examination, Brooks was shown the police drawing and stated that it was a fairly good picture of appellant (844).*

Frank Mari, one of appellant's boyhood friends (861), testified that on May 29, 1976, appellant won \$900 to \$1,000 at the track and that, as a result, appellant said he would "speed up his vacation a little earlier" (862-864). 866).

Various members of appellant's family testified on his behalf. Appellant's father, a businessman, stated that they had been living in the neighborhood of the bank for approximately

*A stipulation was read to the jurors that FBI Agent Sam Wichner, the first FBI agent to speak to Gleason, would testify that Gleason agreed that the robber had Nordic features and that FBI Agent John Walker would state that Criscione had described the robber as 5'8" with blond hair (820). Frank Mari testified that appellant's hair was brown (868).

19 years (882) and that appellant, who was 22 years old at the time of trial, and appellant's younger sister, as well as his older sister and her husband, all lived in the family home (882, 885). Mr. Moskowitz testified that the practice of the household was that the last person to return to the house would lock the doors with a chain from the inside (886, 888-889), and explained that it was his practice to awake at 6:15 a.m., dress, have breakfast, and walk his dog, a German shepherd (890). Appellant was the last person home on June 3, 1976, and on that day, the front and back doors to the house were both locked (890-893, 921). Further, appellant's father explained that appellant always closed his door when he was in his room, and that on the morning of June 3, the door was closed (894-895, 922). Mr. Moskowitz confirmed that appellant had been talking about going to Florida for a couple of weeks, and that on June 3, 1976, he drove appellant to the airport at about 4:00 p.m. (898, 915). Mr. Moskowitz stated that appellant telephoned his father on June 9 and did not ask whether anyone had come to the house looking for him. Appellant returned home on June 11 (899-901, 943).

Mrs. Robin Lecoanet, appellant's sister, who lives in the downstairs apartment of the family home, testified that her custom and practice was to check the locks on her doors after awakening (954). She stated that on June 3, 1976, the locks on the doors were closed (956, 957). Lecoanet explained that on June 3 she drove to work with her father at about 7:30. At

that time, no other person was awake in the house (959-960). Further, Lecoanet testified that appellant was approximately six feet tall without shoes (964).

Elaine Moskowitz, appellant's 15-year old sister, testified that on June 3, 1976, she got up at 7:00 a.m. and left for school at 8:15; that, except for her father and sister, no one was awake at that time, and that the door to her brother's room was closed (977-978, 980).

Appellant's mother also testified on appellant's behalf. She stated that on June 3, 1976, she awoke between 8:00 and 8:15 a.m., that appellant was home sleeping at that time, and that she remembered that appellant got up around noon (984-986, 996). After appellant awoke, he went to the bathroom, and left the house a short time later, returning about an hour after leaving (986-988, 1010).*

Mrs. Moskowitz also stated that on the day of appellant's arrest, the FBI, after receiving consent, searched her premises (994, 1016).

Appellant testified on his own behalf. He stated that he had never before been arrested or convicted of any crime; that in May 1976 he had just completed a term at Brooklyn College; and that he was working at that time, as he had for the past eight years, at Howard Brooks's service station. One of his responsibilities at the service station was to get change,

*Mrs. Moskowitz testified that appellant planned to go to Florida for a number of weeks (989).

which he usually did at the bank (1020-1021). Further, appellant stated that for three years he was an auxilliary police officer; that he had been involved in many political campaigns; and that he had worked full-time for Senator Buckley's New York City office and, in 1974, in Washington at the Office of Economic Opportunity (1022-1024).

At the end of May 1976, appellant arranged for a position in the Buckley re-election campaign, to commence in mid-June, and that he planned a Florida vacation after school ended and prior to his new employment (1026-1028, 1110). Appellant said that on May 31, 1976, he went to Kennedy Airport, returning with various flight schedules, which were admitted in evidence (1036-1037, 1147-1148). Appellant testified that after his May 31 tour of duty as an auxilliary police officer and prior to leaving for Florida, he never possessed a walkie-talkie (1043-1044). In the evening of June 2, appellant met his friends at the service station on Coney Island Avenue, went to visit a girl at approximately 8:30 p.m., and returned home about midnight (1048-1052, 1157). Appellant closed the front door, locking it with the chain (1052). Appellant denied robbing the bank (1105), testifying that he awoke at approximately 11:30 on the morning of June 3, left his house, and returned about an hour later (1053-1055, 1165). He stated that in the afternoon he went to the bank to deposit a small check. Since the only open window was the drive-in window and the line was long, appellant deposited the check in his savings bank nearby (1055-1061, 1179-1187),

and appellant's savings bank passbook was admitted in evidence. Appellant then went home and was driven to the airport (1062, 1065, 1193).^{*} Further, appellant testified that Frances Criscione was a regular customer of the Brooks service station and that he had serviced her car many times (1101).

The Government presented no rebuttal case.

E. Summations and the Court's Charge^{**}

As to the police drawing, the Assistant United States Attorney had the following to say:

Let's first talk about the composite. Government's exhibit two in evidence. This picture ladies and gentlemen: Did they make this up? Because they wanted to get Mr. Moskowitz? Did they have a picture of Mr. Moskowitz when they drew it? There is no question about it, ladies and gentlemen. They didn't. The only picture they had of Mr. Moskowitz is in his mind, and they had this picture drawn for Mr. Moskowitz' picture was available to them. Before they saw it in the spread and other identification procedures.

Ladies and gentlemen, this is as close an artist's sketch of Mr. Moskowitz as you will ever get.

(1264).

In his charge, the trial judge told the jurors that they could consider the police drawing of the robber as an identification procedure (1351-1352).

After the re-reading of testimony and deliberations, the jurors returned a verdict of guilty as charged.

^{*}Appellant returned from Florida by driving a car for a car transportation agency.

^{**}The complete charge is C to the separate appendix to appellant's brief.

F. The Sentencing Procedure

During appellant's allocution, he told the court that he was convicted of "a heinous crime that [he] did not, would not, and could not commit" (Tr. Sept. 16, 1977, at 10), and made an impassioned plea asserting his innocence (Id., 11-17).

Judge VanGraafeiland sentenced appellant to an interim study, pursuant to 18 U.S.C. §5010(e).

ARGUMENT

Point I

THE FAILURE OF THE TRIAL JUDGE TO SUPPRESS PYLE'S IN-COURT IDENTIFI- CATION TESTIMONY REQUIRES REVERSAL.

Prior to trial, appellant moved to suppress the in-court identification testimony of the various witnesses to the robbery. At the resulting Simmons hearing, one of the witnesses to the crime, Joyce Pyle, indicated that she saw the robber enter the bank with Gleason. On June 4, she saw the police sketch, and five days later, selected appellant's photograph as the one she "felt" was the robber. However, within three weeks of the robbery, Pyle was unable to make an identification from a second photographic spread, and at the August line-up, selected an FBI agent as the bank robber. Subsequent to the line-up, either the Assistant United States Attorney or FBI Agent DiBona told Pyle that her identification at the line-up was wrong, whereupon the witness apologized for her inability to pick "the right fellow." Prior to a second meeting with the Assistant United States Attorney, Pyle learned from either the Assistant or an FBI agent that both Gleason and Criscione had chosen "the right" man. Pyle was then shown separate photographs of the people who had participated in the line-up and finally selected appellant's picture. Despite the procedure employed -- informing Pyle that her identification was incorrect and that the others had picked "the right" man --

the trial judge permitted Pyle to testify to an in-court identification. The failure to suppress this proof constituted error requiring reversal.

This Court has specifically condemned the precise identification procedure used in this case:

We do not approve the practice apparently employed here by the FBI of informing potential witnesses of the "correctness" or "incorrectness" of their pre-trial identifications. Such practices might well so taint an identification as to require reversal.

United States v. Jarvis, 560
F.2d 494, 500 (2d Cir. 1977).

The wisdom of this rule is made clear by the facts here, where the suggestive procedures enhanced the probability of mistaken identification. See Manson v. Brathwaite, 97 S.Ct. 2243, 2253 (1977). Pyle had an extremely brief opportunity to view the bank robber. Before the law enforcement authorities told her that she had picked "the wrong" man, Pyle made only one photographic identification within a week of the robbery. However, this was after she had been shown the completed composite sketch, which had been altered at the suggestion of another witness to the crime. The suggestiveness of this procedure is reflected by the subsequent events. Three weeks after the robbery, Pyle was unable to identify anyone at all; indeed, it was only after her affirmative misidentification apology and the suggestive procedures employed that she ultimately settled on appellant as the robber. Because Pyle was not again corrected, this inevitably encouraged her belief that she had finally picked

the right man. As a result, at trial she indicated that she was now "certain" (716) that appellant was the robber.

While the specific facts in Jarvis did not mandate reversal, id., 560 F.2d at 500, a different result is required here. See United States v. Russell, 532 F.2d 1063 (6th Cir. 1976) (McCree, J.). The evidence linking appellant to the crime consisted solely of eyewitness testimony. Significantly, this proof was contradicted by a bank employee who not only had an opportunity to view the bank robber, but who knew appellant by sight and consistently asserted that appellant was not the robber. Corroborating evidence was virtually nonexistent. The Government relied on appellant's trip to Florida as evidence of flight, and his cashing of a Buckley payroll check at either a Manhattan branch of the Chemical Bank or by an employee of the Buckley re-election committee as evidence of guilt. These acts were innocent by themselves and did not connect appellant to the bank robbery.

In any event, appellant explained that his vacation had been planned weeks in advance as a respite between school and his new employment on Senator Buckley's campaign staff, an explanation corroborated by totally disinterested witnesses (Doyle and Brooks) and documentary evidence (flight schedules), as well as by appellant's family. Further, appellant explained that he cashed his paycheck near his place of employment for convenience, a pattern similar to one previously used in 1973 when appellant had worked in Senator Buckley's office for the summer. Appel-

lant's testimony on this issue was corroborated by the bank's records (1026).

The Court's holding in Russell -- where there were also three identification witnesses who testified at trial -- is as applicable to the facts of this case as it was there:

Without Mrs. Fiorenzo's identification [here, Pyle] to buttress that of the two witnesses who were inside the bank, we cannot be certain that appellant's alibi testimony might not have created a reasonable doubt about his guilt in the minds of the jurors.

United States v. Russell,
supra, 532 F.2d at 1069.*

In light of appellant's background and lifestyle, it was almost inconceivable that he would rob a neighborhood bank at which he had an account and which he had frequented for years, much less do so without concealing his features. A bank employee who remembered appellant as a customer of the bank repeatedly asserted that appellant was not the robber. Not surprisingly, appellant passionately maintained his innocence, even at the sentencing proceeding, when admission of guilt and repentance would have been to his advantage. Because the error involving Pyle's eyewitness testimony was critical and the dangers of mistaken identification so great, reversal is required.

*The horrors of mistaken identification are chronicled in Wall, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES at 5-8, 11, 13 (1965); see also Brathwaite v. Manson, 527 F.2d 363, 369 n.11 (2d Cir. 1975), reversed on other grounds, 97 S.Ct. 2243 (1977).

Point II

THE ADMISSION OF THE POLICE SKETCH OF THE ROBBER WAS ERROR REQUIRING REVERSAL.

Prior to trial, appellant moved to exclude the police sketch from evidence. The trial judge denied the motion, ruling that the drawing was admissible under Rule 801(d)(1)(C) of the Federal Rules of Evidence as a prior statement of identification. As part of the Government's direct case at trial, over defense objections (467), the composite sketch was admitted in evidence in the course of Gleason's direct testimony. Further, the witnesses described the procedures by which the drawing was created, and testified that it was a "good likeness" or a "fair and accurate representation of the robber." The admission of this police artist's sketch was error, and reversal of the judgment is accordingly required.

Rule 801(d)(1)(C), Fed.R.Ev., provides, in pertinent part:

A statement is not hearsay if ... the declarant testifies at the trial or hearing and is subject to cross-examination and the statement is ... (C) one of identification of a person made after perceiving him.

Thus, to be admissible, the proof must be a statement* and the declarant must testify at trial. Because the artist's sketch

*Rule 801(a) defines a "statement" as "(1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion."

did not comply with these prerequisites, the proof should have been excluded.*

In holding that a composite sketch was not a statement as defined under 18 U.S.C. §3500(e),** the Seventh Circuit, in United States v. Zurita, 369 F.2d 474 (7th Cir. 1966), explained:

A picture may be worth a thousand words, but it does not record those words or reproduce them or, indeed, even indicate what they are. Drawing is selective and interpretive, and an artist, even when attempting to copy or to work from another's direction, is not merely a stenographer with a peculiar system of shorthand. His work contains and reveals his impressions from information given to him.

While a composite drawing made from photographs and descriptions may be some evidence of words, it cannot be considered a recordation or reproduction of words.

Id., 369 F.2d at 477.

Thus, the sketch "contains and represents 'the agent's interpretations or impressions;'" accordingly, it is not admissible as an adopted statement of the witnesses who participated in making the drawing. United States v. Zurita, supra, 369 F.2d at 477.

*See generally Admissibility in Evidence of Composite Picture or Sketch Provided by Police to Identify Offender, 42 A A.L.R.3d 1217.

**As then written, 18 U.S.C. §3500(e) defined a statement as "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement."

Moreover, unlike the situation presented in United States v. Marchand, Docket No. 77-1131, slip op. 5391, 5415-5417 (2d Cir., August 22, 1977),* here the maker of the drawing -- the police artist -- never testified. Consequently, the sketch should have been excluded on this ground as well, since Rule 801(d)(1) requires that the declarant testify at trial. Cf. United States v. Jenkins, 496 F.2d 57, 68-69 (2d Cir.), cert. denied, 426 U.S. 925 (1975) (testimony of non-declarant witness to identification procedures excluded).

In addition, the rule requires that the declarant -- here, the police artist -- be subject to cross-examination -- perhaps the best guarantee of the reliability of any hearsay statement. However, the procedures employed did not comport with this requirement, either, and impermissibly insulated the artist from any cross-examination whatsoever.

*Marchand did not involve the claim presented here, since Marchand claimed only that Rule 801(d)(1)(C) pertains solely to corporeal identifications. United States v. Marchand, supra, slip op. at 5415; see also United States v. Lewis, Docket No. 77-1224, slip op. 451, 455-458 (2d Cir., November 21, 1977).

United States ex rel. Gerald v. Deegan, 292 F.Supp. 968, 975 (S.D.N.Y. 1968), upon which the trial judge relied, is also distinguishable. There, the question presented involved a due process claim on the unfairness of the identification procedures. The court did not deal with the admissibility at trial of a composite, finding only that it was "evidence of an independent origin for the in-court identification." Similarly, in United States v. Messina, 507 F.2d 73, 76 (2d Cir. 1974), this Court did not deal with the question of the admissibility of a police sketch.

Even if the police artist's sketch were considered a statement, it was, at best, a double hearsay portrayal of the witnesses' prior out-of-court description of the robber. As such, it was a prior consistent statement which should have been excluded from the Government's direct case, in accordance with Rule 801(d)(1)(B) of the Federal Rules of Evidence.* United States v. Lombardi, 550 F.2d 827, 828 (2d Cir. 1977).

The police sketch here was a subjective rendering of the person who committed the robbery -- not of appellant, who was unknown at the time to the Government's witnesses. Thus, its admission was not probative of the central question for the jurors' consideration -- whether the witnesses correctly identified appellant as the bank robber. Because it was not included within the provisions of Rule 801(d)(1), but rather was hearsay, it should have been excluded. The trial court's failure to do so requires reversal.

*The Rule allows prior consistent statements only when "offered to rebut an express or implied charge against [a witness] of recent fabrication or improper influence or motive." Rule 801(d)(1)(B), Fed.R.Ev.

CONCLUSION

For the foregoing reasons, the judgment of the district court must be reversed and the case remanded for a new trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Dec 23, 1977

I hereby certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Nathan H. Korman